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IN THE

Supreme Court of the United States

October Term, 1970

No. 436

BIRDIE MAE DAVIS, *et al.*,

Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*

MOTION TO ADVANCE AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BIRDIE MAE DAVIS, *et al.*,

Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*

MOTION TO ADVANCE

Petitioners, by their undersigned counsel, respectfully move that the Court advance its consideration and disposition of this case, which presents issues of national importance about which the court below and other United States Courts of Appeals are divided in their interpretation of *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), *Alexander* v. *Holmes County Bd of Educ.*, 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 296 (1970). These issues require prompt resolution by this Court for the reasons stated in the annexed Petition for Writ of Certiorari.

WHEREFORE, petitioners pray that the Court:

1. Consider this motion immediately;

2. shorten the time for filing respondents' response to the annexed petition and

3. consider the annexed petition at the Court's earliest possible opportunity.

Respectfully submitted,

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v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 8, 1970. Petition for rehearing was denied June 29, 1970.

Opinions Below

The opinions of the courts below directly preceding this petition[1] are as follows:

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[1] Earlier proceedings in this case are reported as *Davis* v. *Board of School Comm'rs of Mobile County*, 318 F.2d 63 (5th Cir. 1963); 322 F.2d 356 (5th Cir.), stay denied, 11 L.Ed.2d 26 (Mr. Justice Black, Circuit Justice), cert. denied, 375 U.S. 894 (1963), rehearing denied, 376 U.S. 898 (1964); 333 F.2d 53 (5th Cir.), cert. denied, 379 U.S. 844 (1964); 364 F.2d 896 (5th Cir. 1966); 393 F.2d 690 (5th Cir. 1968); 414 F.2d 609 (5th Cir. 1969); sub nom. *Singleton* v. *Jackson Municipal Separate School Dist.*, 421 F.2d 1211 (5th Cir.), interim relief ordered, 38 U.S.L.W. 3220 (1969), rev'd sub nom. *Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970).

1. Opinion and order of the District Court filed January 31, 1970, unreported (1a-7a).
2. Opinion of the Court of Appeals filed June 8, 1970, not yet reported (8a-22a).
3. The judgment of the Court of Appeals (23a-24a).
4. Orders of the Court of Appeals on the petition for rehearing (8a-22a).

Jurisdiction

The judgment of the Court of Appeals was entered on June 8, 1970 (24a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Upon request from the courts below, the United States Department of Health, Education, and Welfare developed several plans to desegregate public schools in Mobile County, Alabama. One plan integrated each school in the system by establishing a number of school pairings and clusters which necessitate the incidental transportation of both black and white students. This technique of student assignment—the use of school attendance zones with noncontiguous parts and the transportation of students—had long been used in the Mobile school system to maintain segregated schools. In spite of this history and without any evidentiary hearing in the District Court, the Court of Appeals rejected this H.E.W. plan and ordered the implementation of a plan which leaves 7,725 black students in eight all-black schools. The rejection of the H.E.W. plan was based solely on the Court's deference to a hypothetical "neighborhood school concept" (13a) which Mobile had not theretofore had.

The fundamental question presented to this Court is whether black students are denied the equal protection of the laws when they continue to be assigned to segregated black schools despite the availability of an alternative method of student assignment which would desegregate every school in the system and which is proved feasible by the school board's past use of the same assignment techniques.

Constitutional Provision Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement

1. A Brief Overview of the School System.

Mobile has a combined rural and metropolitan school system serving the whole of Mobile County. It is the largest school system in Alabama; 91 schools in the system served 73,504 students during 1969-70. The total number of white students is 42,620, or 58% of all students and the total number of black students is 30,884, or 42% of all students.

Throughout the litigation to desegregate Mobile's schools, the rural and metropolitan portions of the system have been treated separately. Since September 1969 the rural portion of the system has been desegregated adequately and this petition concerns only the metropolitan area comprised of the contiguous cities of Mobile, Pritchard and Chickasaw. Within the metropolitan area there are 65 schools serving 54,913 students, of whom 27,769 or 50.5% are white and 27,144 or 49.5% are black.

In addition to the rural-metropolitan division, another division has more recently been advanced in this litigation. This newer division is between the eastern and western parts of the metropolitan area with Interstate Highway I-65 used as a north-south divider. The western part is predominantly white with 17 schools serving 13,875 students, of whom 12,172 or 88% are white and 1,703 or 12% are black. The eastern part is majority black with 48 schools serving 41,038 students, of whom 15,597 or 38% are white and 25,441 or 62% are black.

The controversy which led to this Court's decision in *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970), concerned the decisions of the courts below to treat separately the predominantly white and majority black parts of metropolitan Mobile by permitting the formulation of separate plans for each, and to delay desegregating the majority-black part until 1970-71. It is the continuing effort by the school board and the courts below to subdivide the metropolitan area which necessitates action by this Court.

2. Summary of Proceedings in the Courts Below.

This action by black parents and students to desegregate Mobile County's public schools began in 1963. The United States intervened in 1967 and successive groups of white parents intervened in 1968 and earlier this year. The current phase of this litigation began with the Court of Appeals' June 3, 1969 decision.

The main issue before the Court of Appeals at that time was whether the School Board and the District Court had complied with a previous decision of the Court of Appeals[2] by establishing school attendance zones for elemen-

[2] The June 3, 1969 decision is reported at 414 F.2d 609; the previous decision is reported at 393 F.2d 690.

tary and junior high schools, and maintaining freedom of choice for high school students in metropolitan Mobile. A second issue was retention of freedom of choice for all students in rural Mobile County. The Court of Appeals found that the District Court had "ignored the unequivocal directive to make a conscious effort in locating attendance zones to desegregate and eliminate past segregation." 414 F.2d at 611. Freedom of choice in metropolitan high schools and all rural schools was also held to be unacceptable. Accordingly, the Court of Appeals ordered the prompt formulation of a plan "to fully and affirmatively desegregate all public schools in Mobile County, urban and rural . . ." and directed the District Court to request the Office of Education of the United States Department of Health, Education, and Welfare to collaborate with the School Board and submit its own desegregation plan if agreement with the Board was not possible. *Ibid.*

H.E.W. and the School Board could not agree on a plan and H.E.W. submitted its own county-wide desegregation plan on July 10, 1969. The plan provided for zoning all schools in rural and metropolitan Mobile (some schools would be paired within zones), closing four black schools in eastern Mobile, and transporting 2,000 black students from the closed schools to white schools in the western and southern parts of the metropolitan area. Petitioners sought implementation of the plan with amendments to correct two deficiencies: (1) the plan retained five large all-black elementary schools serving 5,500 students because H.E.W. was unwilling to recommend the transportation of white students in addition to the transportation of black students; and (2) the plan deferred desegregation in eastern metropolitan Mobile, where 85% of the system's black students live, until 1970-71. On August 1, 1969, without a hearing, the District Court ordered the implemen-

tation of H.E.W.'s plan for rural and western metropolitan Mobile, as modified by the Court to eliminate the H.E.W. proposal to transport 2,000 black students from eastern to western metropolitan Mobile. The District Court did accept H.E.W.'s plan to defer desegregation in eastern metropolitan Mobile until 1970-71.

Petitioners appealed the delay, the Court of Appeals affirmed,[3] Mr. Justice Black ordered the School Board to prepare for desegregation by February 1, 1970,[4] and this Court reversed the delay.[5] The case returned to the District Court in late January 1970 for second semester implementation of a plan to complete the desegregation of Mobile's schools.

In the meanwhile, H.E.W. had submitted two additional plans to the District Court on December 1, 1969.[6] Using the July 10, 1969 plan as a base (and labelling it Plan B), H.E.W. proposed one modification (Plan B Alternative) which totally eliminated the transportation of students by continuing in operation the four black schools which the July, 1969 plan closed. Plan B Alternative would leave nine all-black schools serving 7,971 students (15a). The second modification (Plan B-1 Alternative) recommended closing two black schools, and pairing or clustering all other black schools in eastern Mobile with white school in western or southern Mobile. Transportation of both

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[3] *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969).

[4] 38 U.S.L.W. 3220 (1969).

[5] *Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970).

[6] These additional H.E.W. plans were submitted in accordance with the District Court's August 1, 1969 decision which established December 1, 1969 as the time for submitting plans for the 1970-71 school year.

black and white students would be required and all schools in the system would be integrated (*Ibid.*).[7]

The same day, the School Board submitted its own plan for eastern Mobile. It assigned 18,832 black students to 21 all or nearly all black schools.[8]

The District Court called attorneys for all parties to a "pre-trial conference" in chambers on January 23, 1970 (2a). At the conference the following positions were taken: (1) petitioners contended that the elementary school provisions of H.E.W.'s Plan B-1 Alternative and the junior and senior high school provisions of H.E.W.'s Plan B should be implemented forthwith, but if the transportation proposals made immediate relief impossible and the District Court selected another plan *pendente lite,* then a hearing should be promptly set to determine a permanent plan; (2) the United States proposed that the H.E.W. plan involving no transportation (Plan B Alternative) be implemented *pendente lite* while discovery and hearings on a permanent plan proceeded; (3) the School Board argued against any changes in its operations; and (4) the District Court stated it would not consider the plans petitioners supported and that the School Board's December 1, 1969 plan was unacceptable without modifications.

The District Court concluded the conference by asking the School Board for modification of its December 1, 1969 plan and the United States "for [a] revision of the H.E.W. plan which the government thought should be followed for the remainder of the present school year" (2a). The

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[7] Plan B-1 Alternative involved only elementary schools. For junior and senior high schools it proposed to incorporate the provisions of Plan B.

[8] Petitioners, despite repeated requests, were not served with a copy of the Board's plan and had to move on January 2, 1970 for an order compelling service which was not made until the District Court granted the motion February 27, 1970.

School Board failed to respond to the court's request.[9] The United States submitted a revision of H.E.W.'s no-transportation alternative (Plan B Alternative) "as a plan which could be implemented immediately to remain in effect only for the present school year." [10] Then, despite its own characterization of the January 23 conference as a "pretrial conference" and both petitioners' and the United States' clearly stated position that plaintiffs sought only mid-year relief *pending* hearings on a permanent desegregation plan, the District Court without an evidentiary hearing entered an order on January 31, 1970 which purported to finally disestablish the dual system in Mobile (1a-7a).

Mindless of its expressed view at the January 23, 1970 conference that the Board's proposals were unacceptable, the District Court's order adopted the School Board's December 1, 1969 plan with only several modifications. The order left 18,623 black students, or 60% of the system's black students, in 18 all- or nearly all-black schools (18a-22a). The court dismissed H.E.W.'s Plan B-1 Alternative, which would establish pairings and clusters of non-contiguous zones and require transporttion of students, by making the general observation that it "would require busing of children from areas of the city to a different and unfamiliar area" (3a) and by singling out one[11] of

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[9] In its January 31, 1970 order the District Court commented on the Board's failure:

> "The school board and its staff of administrators and professional educators, who know the Mobile Public School System best, who have all the facts and figures which are absolutely necessary for a meaningful plan, have not assisted or aided the Court voluntarily. Consequently, the plan which is by this decree being ordered is not perfect . . ." (2a-3a).

[10] Brief for the United States in the Court of Appeals, p. 22.

[11] The one elementary arrangement which the court singled out involved three schools, two white and one black, in a cluster. All

the sixteen H.E.W. proposed pairs or clusters, presumably to illustrate the court's conclusion that H.E.W.'s proposal was "motivated for the sole purpose of achieving racial balance" (4a). Similarly, the court dismissed H.E.W.'s Plan B for junior high schools by citing but one atypical proposal to establish a cluster of three junior high schools, stating that in the court's view "the Supreme Court has not held that such drastic techniques are mandatory for the sole purpose of achieving racial balance" (4a).

Petitioners, the United States, and the School Board appealed. Petitioners challenged both the failure of the District Court to conduct an evidentiary hearing before ordering a final plan and the court's failure to require the School Board to implement H.E.W.'s plan to establish non-contiguous pairings and clustering and transport both black and white students to achieve complete desegregation. The United States, while acknowledging that the School Board's past practices indicate that any of H.E.W.'s plans would be feasible, asked the Court of Appeals to require the implementation of H.E.W.'s sole no-transportation plan for the negative reason that "no argument can be made that plan B Alternative, which is the most modest plan,

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students in the cluster would attend one of the white schools for the first and second grades, the second white school for the third grade, and the black school for grades four through six (4a). Of the remaining fifteen elementary school arrangements in H.E.W.'s Plan B-1 Alternative, only one other was similar. Eleven involved only two schools with all students attending either the black or white schools for two or three years and then attending the other school for the remaining elementary school grades. Three other arrangements involved three schools but required attendance at only two schools. Under these arrangements all students in the cluster would attend one school for grades one and two and then divide, with one-half attending the second school in the cluster for grades three through five and the other half attending the third school for the same grades. Neither the simple pairing of two schools serving non-contiguous black and white zones nor this latter type of clustering were discussed by the District Court.

is either educationally unsound or administratively infeasible." [12] The School Board, although cross appealing, sought affirmance of the District Court's order.

The Court of Appeals, after remanding for further findings of fact,[13] decided the appeal on June 8, 1970. The court defined its judicial task in these words:

> We have examined each of the plans presented to the district court in an effort to determine which would go further toward eliminating all Negro or virtually all Negro student body schools while at the same time maintaining the neighborhood school concept of the school system (13a).

In the court's view the neighborhood assignment system allows two alternatives. One alternative requires the assignment of each student to the school nearest his home with such assignments limited only by the capacity of the schools. *Ellis* v. *Board of Public Instruction of Orange County, Florida,* 423 F.2d 203, 207 (5th Cir. 1970). The other alternative is the establishment of attendance zones "on a discretionary basis as distinguished from a strict neighborhood assignment. . . ." *Mannings* v. *Board of Public Instruction of Hillsborough County, Florida,* No. 28643 (5th Cir., May 11, 1970) (Slip Op., p. 6). Mobile, the

[12] Brief for the United States in the Court of Appeals, p. 47.

[13] The remand was required by the District Court's failure to determine how the School Board's plan, which it adopted, would affect the racial composition of any of the system's schools. The remand also directed the District Court to make findings on the extent of desegregation of faculty, transportation and extracurricular activities. Petitioners moved in the District Court on April 6, 1970 to establish a procedure whereby after the Board submitted proposed findings of fact an evidentiary hearing would be held. The School Board submitted an affidavit which the District Court accepted *in toto* "excluding self-serving declarations and speculative opinions." Order of April 14, 1970. Petitioners' motion for a hearing was denied the same day.

court concluded, had itself chosen not to use "the strict neighborhood assignment system" but instead uses "discretionary zones lines" (13a). As Mobile had made that decision for itself, the Court ruled that the desegregation plan "can be greatly improved by pairing some schools located in proximity to each other . . . [and] also be improved by recasting the grade structure in some of the buildings but, at the same time, maintaining the neighborhood school concept" (*Ibid.*).

The plan which found favor with the court was the plan submitted by the United States as a modification of H.E.W.'s no-transportation Plan B Alternative. The plan left 8,515 black students in all–or nearly all–black schools (*Ibid.*); the court required modifications of the plan to reduce the number of black students in all-black schools to 7,725 students in 8 elementary schools, which it noted amounted to 25% of Mobile's black students being assigned to all-black schools (24a). In terms of elementary school students in metropolitan Mobile, the plan results in the assignment of 58% of black elementary school students to all-black schools.

These results were justified by the court in four ways: (1) "every Negro child would attend an integrated school at some time during his education career" (13a); (2) "the all Negro student body schools which will be left after the implementation of the Department of Justice plan, as modified, are the result of neighborhood patterns" (15a-16a); (3) the remaining segregation can be "alleviated" through a policy allowing black students to transfer to white schools with transportation provided (16a); and (4) the situation may be further alleviated by the establishment of a bi-racial committee to serve in an "advisory capacity" to the School Board (*Ibid*).

The Court of Appeals remanded the case to the District Court with instructions to implement a new plan by July 1, 1970. On remand the District Court ordered the implementation of the plan submitted by the United States except for amendments to two school districts which the Court will make.

3. The Techniques of Segregation.

Although the District Court has not permitted any evidentiary hearings on a desegregation plan since the summer of 1968, the record of the extensive hearing that summer and in previous years fully documents the various techniques used by the School Board to segregate Mobile's schools.[14]

a. *Grade Structures.* The Mobile school system has used an extraordinarily wide variety of grade structures, including schools serving grades 1-5, 1-6, 1-7, 1-8, 1-9, 1-12, 2-5, 6-7, 6-8, 6-9, 6-10, 6-12, 7, 7-8, 7-9, 7-11, 7-12, 8-12, 9-12, 10-11, 10-12. By selectively decreasing or increasing the number of grades served at particular schools, the School Board has increased or decreased the area served by the school to coincide with racial residential patterns (R. 26,886 Vol. V, pp. 1527-1534). For example, the School Board established the Hillsdale School as the only metropolitan school serving grades 1-12 in order to restrict its attendance area to a small black community in the western part of the metropolitan area. In downtown Mobile, the School Board between 1962 and 1967 candidly reorganized grade structures, and assigned portables and closed schools, to maintain segregated schools in the face of rapidly shifting racial residency patterns (R. 26,886

[14] This portion of the petition is a summary of a longer analysis of these techniques contained in the Brief for the United States in the Court of Appeals, pp. 4-18. Citations to R. 26,886 are to the record before the Court of Appeals in *Davis* v. *Board of School Commissioners of Mobile County*, 414 F.2d 609 (5th Cir. 1969).

Vol. VI, pp. 25-35). School segregation was also the objective in arranging grade structures at four white schools surrounding a black school in northern metropolitan Mobile to enable white students to attend one white school for grade 6, a second for grades 7 and 8, a third for grade 9, and a fourth for grade 10, all in order to prevent their attendance at a nearby black school (R. 26,886 Vol. IV, pp. 1331-32).

b. *Zones.* The splitting of school attendance zones (i.e., non-contiguous zones) has been a common method of school assignment in Mobile. As many as nineteen non-contiguous zones were used in one year, 1964-65, including one split zone in which the parts were separated by over 11 miles.[15] Transportation between split zones was provided by the School Board (R. 26,886 Vol. I, pp. 5-6).

c. *Portable Classrooms.* The selective assignment of portable classrooms in order to expand the capacity of black schools as a way of avoiding the assignment of black students to under-utilized nearby white schools has been a method of maintaining segregated schools (R. 26,886 Vol. I, pp. 90-93).

d. *Transportation.* Busing has not been limited to the rural parts of the school system. During 1966-67 the School Board bused 7,116 students daily in the metropolitan area. Approximately 2,350 of these students were bused because of non-contiguous zoning (R. 26,886 Vol. I, pp. 5-6) A considerable amount of busing was designed to maintain segregation. As an example, 582 black students were bused over 6 miles from rural Saraland and Satsuma to a black school in metropolitan Mobile to prevent integration at white schools in their communities (*Ibid*).

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[15] The facts were culled from numerous exhibits and appear in summary form in the Brief of the United States in the Court of Appeals, pp. 7-9 and Appendix C.

e. *Construction.* New schools in Mobile have been located in order to serve only selected racial groups. For example, although population movements in downtown Mobile left unused classrooms in white schools, the Board embarked on a plan during the 1966-67 school year to construct four schools for black students in order to avoid the reassignment of blacks at overcrowded black schools to available space at white schools (R. 26,886 Vol. VI, pp. 25-35). A few years earlier, in 1963, the School Board sought to justify to this Court its failure to even begin desegregation by pointing to its ongoing construction of "colored schools." Justice Black's opinion in chambers recited the Board's contentions:

> Yet this record fails to show that the Mobile Board has made a single move of any kind looking towards a constitutional public school system. Instead, the Board in this case has rested on its insistence that continuation of the segregated system is in the best interests of the colored people and that desegregation would "seriously delay and possibly completely stop" the Board's building program "particularly the improvement of and completion of sufficient colored schools which are so urgently needed." In recent years, more than 50% of its building funds, the Board pointed out to the parents and guardians of its colored pupils, had been spent to "build and improve colored schools," and of eleven million dollars that would be spent in 1963, over seven million would be devoted to "colored schools."
>
> . . . .
>
> It is quite apparent from these statements that Mobile County's program for the future of its public school system "lends itself to perpetuation of segregation" . . . *Davis* v. *Board of School Commissioners of Mobile County,* 11 L. Ed. 2d 26, 28 (1963)

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts With Rulings Both of This Court Since *Brown* and of Other Courts of Appeals. It Absolves School Boards of Responsibility to Provide Equal Educational Opportunity to Black Students Contained in Segregated Schools by "Neighborhood Residential Patterns" Which Are Themselves the Result of State Action Combined With Private Discrimination.

Since *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), this Court has consistently invalidated subterfuges by which school districts have sought to maintain racially separate and identifiable schools, whether such devices relied upon school board or private initiative to produce the desired result. *E.g., Cooper* v. *Aaron*, 358 U.S. 1 (1958) (delay sought due to community opposition); *Goss* v. *Board of Educ. of Knoxville*, 373 U.S. 683 (1963) (minority-to-majority transfer allowing avoidance of integration); *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968) (free transfer plan permitting same result); *cf. Calhoun* v. *Latimer*, 377 U.S. 263 (1964) (grade-a-year desegregation). Lower courts have done the same. *E.g., Dove* v. *Parham*, 282 F.2d 256, 258 (8th Cir. 1960) (pupil placement); *Brewer* v. *School Bd. of City of Norfolk*, No. 14, 544 (4th Cir., June 22, 1970) (*en banc*) (assignments based on social class); *Monroe* v. *Board of Comm'rs of Jackson*, No. 19720 (6th Cir., June 19, 1970) (same); *Stell* v. *Savannah-Chatham County Bd. of Educ.*, 333 F.2d 55, 62 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964) (assignment based on purported intelligence differences among races), *compare Anthony* v. *Marshall County Bd. of Educ.*, 419

F.2d 1211 (5th Cir. 1969), *rev'd on other grounds sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970) (assignment by achievement test scores); *United States* v. *Lincoln County Bd. of Educ.*, 301 F. Supp. 1024 (S.D. Ga. 1969) (same); *McFerren* v. *Fayette County Bd. of Educ.*, Civ. No. C-65-136 (W.D. Tenn., December 24, 1969) (sex segregation).

The progress so far been realized in converting dual school systems into unitary ones from which all vestiges of discrimination have been extirpated, *Green* v. *County School Bd. of New Kent County, supra,* is severely jeopardized by the decision below and others like it which have seized upon a justification for continued segregation in the so-called "neighborhood school concept." [16]

This concept, whatever it means—imprecision is one of its characteristics, *compare Ellis* v. *Board of Public Instruction of Orange County, supra, with Mannings* v. *Board of Public Instruction of Hillsborough County, supra*—has been advocated in the past as in the present by those seeking to preserve segregation. As former Chief Judge Tuttle observed earlier in this very litigation, the "neighborhood school is a euphemism for separation."

> Both in the testimony and in the briefs, much is said by the appellees about the virtues of "neighborhood schools." Of course, in the brief of the Board of Education, the word "neighborhood" doesn't mean what it usually means. When spoken of as a means to require Negro children to attend a Negro school in the vicinity

[16] *E.g., Ellis* v. *Board of Public Instruction of Orange County, supra; Mannings* v. *Board of Public Instruction of Hillsborough County, supra; Carr* v. *Montgomery County Bd. of Educ.*, No. 29521 (5th Cir., June 29, 1970); *Bradley* v. *Board of Public Instruction of Pinellas County*, No. 28639 (5th Cir., July 1, 1970); *Ross* v. *Eckels*, Civ. No. 10,444 (S.D. Tex., June 1, 1970); *Calhoun* v. *Cook*, Civ. No. 6298 (N.D. Ga., Feb. 19, 1970); *Valley* v. *Rapides Parish School Bd.*, Civ. No. 10,946 (W.D. La., July 5, 1970).

of their homes, it is spoken of as a "neighborhood" school plan. When the plan permits a white child to leave his Negro "neighborhood" to attend a white school in another "neighborhood" it becomes apparent that the "neighborhood" is something else again. As every member of this court knows, there are neighborhoods in the South and in every city of the South which contain both Negro and white people. So far as has come to the attention of this court, no Board of Education has yet suggested that *every* child be required to attend his "neighborhood school" if the neighborhood school is a Negro school. Every board of education has claimed the right to assign every white child to a school other than the neighborhood school under such circumstances. And yet, when it is suggested that Negro children in Negro neighborhoods be permitted to break out of the segregated pattern of their own race in order to avoid the "inherently unequal" education of "separate educational facilities," the answer too often is that the children should attend their "neighborhood school."

So, too, there is a hollow sound to the superficially appealing statement that school areas are designed by observing safety factors such as highways, railroads, streams, etc. No matter how many such barriers there may be, none of them is so grave as to prevent the white child whose "area" school is Negro from crossing the barrier and enrolling in the nearest white school even though it be several intervening "areas" away.

Davis v. *Board of School Comm'rs of Mobile County*, 364 F.2d 896, 901 (5th Cir. 1966).

It is only now, after the decisions of this Court in *Alexander, Carter* and *Northcross* have made unmistakable the

requirement of integration, that the "neighborhood school" is offered as an inviolate principle of student assignment. Like its predecessors—pupil placement and similar schemes —its purpose is obvious: to provide a superficially neutral gloss to the maintenance of racially separated schools.

Manipulating the "neighborhood school concept" today, as many school boards seek to have it applied, and as the Court of Appeals used it, means in almost every instance (except in small, rural districts) that a significant segment of a school district's black student population will continue to be assigned to all-black schools. This departure from the clear mandates of this Court from *Brown* to *Northcross* is offered as justifiable because of "neighborhood residential patterns."

Nowhere is this new rule more anomalous in result than in Mobile. The district court had before it a number of different desegregation plans for the Mobile school system, submitted under court order because freedom of choice had failed to change Mobile's dual school system. Yet neither the district court nor the Court of Appeals chose the plan which would integrate every school and destroy racial identifiability in the school system. Instead, both courts left black students and white students alike in segregated schools to preserve what they erroneously perceived to be Mobile's "neighborhood school system."

But we do not deal here, as Judge Tuttle recognized four years ago, with a school system in which the neighborhood school concept has a long, hallowed or neutral history. Mobile never considered the neighborhood school concept a bar to its efforts to prevent the attendance of black and white students at the same schools. The extensive record and prolonged proceedings in this case show that the pairing of non-contiguous attendance zones, the transportation of students from one school zone to another, the closing

and conversion of schools, and the manipulation of grade structures—techniques proposed by HEW to completely dismantle Mobile's dual system by desegregating every school—were all established techniques of school administration when the objective was segregation.

This Court held in *Green* that school districts must consider proposed desegregation plans not in isolation and abstraction but in "light of any alternatives which may be shown as feasible and more promising in their effectiveness." 391 U.S. at 439. In Mobile, there is an alternative plan to test the effectiveness of that approved below.[17] The appropriate allocation of burdens requires the School Board to demonstrate its unworkability beyond question. That task has not been undertaken because the Court of Appeals saw fit to create, on its own, a new and absolute principle—

> Under the neighborhood assignment basis in a unitary system, the child must attend the nearest school whether it be a formerly white school or a formerly Negro school. *Ellis* v. *Board of Public Instruction of Orange County,* 423 F.2d 203, 207 (5th Cir. 1970)

—and then excuse the board from burdens it must carry under decisions of this Court. The fashioning by the Court of Appeals of the neighborhood school concept in absolute terms is as new a judicial invention as it is a principle of school administration in Mobile.[18] Invoking this concept

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[17] Where, as here, the alternative was formulated with the expertise of the United States Department of Health, Education and Welfare at the request of the district court, the "school districts are to bear the burden of demonstrating beyond question, after a hearing, the unworkability of the proposals. . . ." *Carter* v. *West Feliciana Parish School Bd.,* 396 U.S. 290, 292 (1970) (concurring opinion).

[18] See generally, Weinberg, Race and Place—A Legal History of the Neighborhood School (U.S. Gov't Printing Office, Catalogue No. FS 5.238:38005, 1967).

as an absolute bar to considering feasible alternatives in a process which requires the examination of individual circumstances of individual districts is plainly contrary to the decisions of this Court.

The absoluteness of the neighborhood school concept employed by the Court below cannot be overstated. Only the pupil assignment techniques of contiguous single-school zoning or contiguous pairing have been held permissible; any segregated school remaining after these two techniques have been exhausted is judicially sanctioned on the ground that it results solely from "neighborhood residential patterns." Yet the Court overlooks the vital role played by the school system itself in creating and defining the "neighborhoods" which are now held to be beyond the pale of school board corrective action. As Judge McMillan has said, referring to Charlotte, "Putting a school in a particular location is the active force which creates a temporary community of interest among those who at the moment have children in that school," *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 300 F. Supp. 1358, 1369 (W.D.N.C. 1969) (emphasis omitted). We have pointed out above that the record in this case vividly demonstrates the degree to which the Mobile school board has in the past been able to maintain *white* and *black school "neighborhoods"* through manipulation of attendance boundaries, grade structures, portable classroom placement and the pupil transportation system.

Like the minority-to-majority transfer disapproved in *Goss* v. *Board of Educ. of Knoxville, supra,* the "neighborhood school concept" permits private action which results in the maintenance of segregated schools. To begin with, there is a historic and pervasive pattern of housing segregation caused by discrimination against black people throughout the Nation. In the past, the policy of discrimi-

nation received the blessing of the federal government. *Racial Isolation in the Public Schools,* A Report of the U.S. Commission on Civil Rights 254 (1967). *See also,* Abrams, *Forbidden Neighbors* 233 (1955) and Weaver, *The Negro Ghetto* 71-73 (1948). In 1968, recognition of the problem led the United States to take affirmative steps to make housing available to minorities with the passage of the Fair Housing Act of 1968, 42 U.S.C.A. §§ 3601 et seq. (Supp. 1970); *see also, Jones* v. *Alfred H. Mayer & Co.,* 392 U.S. 409 (1969). But even if active housing discrimination were to cease, its residual effects persist. *See Racial Isolation in the Public Schools, supra,* at 201-02, Legal Appendix at 255-56.

Furthermore, the record in this case shows that the present residential patterns in Mobile result to a substantial degree from discriminatory policies of the federal, state and local governments. For example, there has been a close relationship between the school board and the public housing authorities in the Mobile area regarding location of racially identifiable housing projects and the concommitant nearby location of school facilities which have traditionally been, and which continue to be racially identifiable. *E.g.,* Pl. Int. Ex. 87 (July 1967 hearing).

Making pupil assignment merely reflective of housing patterns will therefore often but mirror community segregation and discrimination; it ignores the *affirmative* duty of school boards formerly operating dual systems to bring about integration. *Green* v. *County School Bd. of New Kent County, supra.*

The Court of Appeals for the Fourth Circuit has recognized the problem. In *Brewer* v. *School Bd. of City of Norfolk,* 397 F.2d 37, 41-42 (4th Cir. 1968), that Circuit held that

> Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color.

Other Courts have likewise measured the "neighborhood school concept" as a permissible desegregation device by examining the *alternatives* available and the results of its application.

The United States Court of Appeals for the Eighth Circuit recently considered the mandates of this Court in a challenge to Little Rock, Arkansas's continuing failure to desegregate its schools. At issue in this urban school system was the acceptability of a geographic zoning plan in light of several alternative plans involving the pairing of schools and transportation of students. The Eighth Circuit reviewed the results of Little Rock's geographic zoning plan against this statement of the law:

> Thus, as of this date it is not enough that a scheme for the correction of state sanctioned school segregation is non-discriminatory on its face and in theory. It must also prove effective. As the Court observed in *Green*:
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> "In the context of the state imposed pattern of long standing, the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to call for the dismantling of a well-entrenched dual system." 391 U.S. at 437.
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> We believe that geographic attendance zones, just as the Arkansas pupil placement statutes, "freedom of choice" or any other means of pupil assignment must

> be tested by this same standard. In certain instances geographic zoning may be a satisfactory means of desegregation. In others it alone may be deficient. Always, however, it must be implemented so as to promote desegregation rather than to reinforce segregation [citations omitted]. *Clark* v. *Board of Education of the Little Rock School District,* No. 19,795 (8th Cir., May 13, 1970) (en banc) (Slip op., pp. 14-15).

Applying this test to the results of Little Rock's geographic zoning plan the Eighth Circuit found that the plan retained racially identifiable schools in the face of at least one alternative which would eliminate the racial identifiability at several such schools. The court held that the record could not sustain a holding that the geographical zoning plan "is the *only* 'feasible' means of assigning pupils to facilities in the Little Rock School System" (*Ibid.*) and while declining to decide on an absolute basis whether "geographical zoning or the neighborhood school concept are in and of themselves either constitutionally required or forbidden" the Court held "that as employed in the plan now before us they do not satisfy the constitutional obligations of the District" (*Id.* at 19-20).

The Eighth Circuit also declined to establish an absolute rule of transportation:

> Lastly, we do not rule that busing is either required or forbidden. As Judge Blackmun stated in *Kemp III,* "Busing is only one possible tool in the implementation of unitary schools. Busing may or may not be a useful factor in the required and forthcoming solution of the . . . problem which the District faces."

Kemp III, the El Dorado, Arkansas school case, focused on the *feasibility* of transportation as a technique of desegregation:

> It may or may not be feasible to use it [busing], in whole or in part, for Fairview-Watson-Murmil Heights and it may or may not be feasible to use it, in whole or in part, elsewhere in the system. Busing is not an untried or new device for this District. *Kemp* v. *Beasley*, No. 19,782 (8th Cir., March 17, 1970) (Slip op., p. 14).

Similarly in *Little Rock* the Court took occasion to note "that busing is not an alien practice" and had been used by the District "to preserve segregation" (Slip op. p. 20).

Following its 1968 decision in *Brewer, supra*, the United States Court of Appeals for the Fourth Circuit has refused to make the neighborhood school concept an inviolate principle in the way the Fifth Circuit believes it is. The Fourth Circuit, although observing that "[busing] is not a panacea," has held that "busing is a permissible tool for achieving integration...." *Swann* v. *Charlotte-Mecklenburg Board of Education*, No. 14,517 (4th Cir., May 26, 1970) (Slip op., p. 18). The court specifically condemned the School Board's rejection of a variety of legitimate techniques of desegregation.

> The district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated. . . . The consultants that the board employed were undoubtedly competent, but the board limited their choice of remedies by maintaining each school's grade structure. This, in effect, restricted the means of overcoming segregation to only geographical zoning, and as a further restriction the board insisted on contiguous zones. The board rejected such legitimate techniques as pairing, grouping, clustering, and satellite zoning (Slip op., pp. 22-23).

On remand, the Court held that "every method of desegregation, including rezoning with or without satellites, pairing, grouping, and school consolidation" should be explored, and that "undoubtedly some transportation will be necessary to supplement these techniques" (Slip op., p. 25). Nowhere is there any suggestion that the neighborhood school concept is an absolute bar to a plan entailing the transportation of students.[19] [20]

See also, Davis v. *School Dist. of City of Pontiac*, 309 F. Supp. 734 (E.D. Mich. 1970); *Spangler* v. *Pasadena City Bd. of Educ.*, Civ. No. 64-1438-R (C.D. Cal., March 12, 1970); *Crawford* v. *Board of Educ. of City of Los Angeles*, No. 822-854 (Super. Ct. Cal., February 11, 1970).

Ellis v. *Board of Public Instruction of Orange County, Florida, supra*, suggests that the objectives served by neighborhood schools are "to eliminate transportation costs and to permit the student to remain as near home as pos-

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[19] Petitioners wish to make clear that noting the conflict between the Fourth and Fifth Circuits does not in any way constitute an endorsement of the Fourth Circuit's limitation of remedial power by its "reasonableness" doctrine. See Petition for Writ of Certiorari, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, No. 281, O.T. 1970, *cert. granted*, June 29, 1970, 38 U.S.L.W. 3522.

[20] In a concurring opinion in *Brewer* v. *School Bd. of City of Norfolk*, No. 14,544 (4th Cir., June 22, 1970), *cert. denied*, 38 U.S. L.W. 3522 (June 29, 1970), Judges Sobeloff and Winter wrote:

> The District Court should not tolerate any new scheme or "principle," however characterized, that is erected upon and has the effect of preserving the dual system. This applies to the "neighborhood school" concept, a shibboleth decisively rejected by this court in *Swann* (Judge Bryan dissenting), as an impediment to the performance of the duty to desegregate. The purely contiguous zoning plan advanced by the Board in that case was rejected by five of the six judges who participated. A new plan for Norfolk that is no more than an overlay of existing residential patterns likewise will not suffice. (Slip op. at pp. 1-2)

sible". *Ibid.* The absoluteness of the principle prevents any inquiry into the extent to which alternative assignment methods may in fact or law counteract these objectives.

If the saving of transportation costs is a legitimate objective then the actual impact of a plan on these costs must be appraised. Yet the Court of Appeals' formulation of the neighborhood school concept bars any determination of these increased costs, the school board's ability to bear them, and the availability of state assistance to defray a portion of the costs. Mobile is a school district which engages in extensive busing (during 1967-68 207 buses transported 22,094 students daily)[21] and by examining its past operation and present financial situation it would be possible to determine the actual impact of an order requiring the transportation of additional students. Furthermore, the court's formulation permits no consideration of the savings which transportation might enable in the system's school construction program. The School Board has been enjoined since 1969 from constructing two additional schools in Mobile's black ghetto. 414 F. 2d at 610. The use of presently unused capacity in white schools would eliminate the need to construct these facilities and the use of transportation to better utilize existing facilities might actually save the school system money. Finally, if the facts show that Mobile's transportation expenditures must actually increase beyond state assistance and savings in school construction costs, then the absoluteness of the court's neighborhood school concept forecloses judicial consideration whether the saving of money is a legitimate basis for maintaining racially separated schools.

The other objective which the neighborhood school concept is said to serve is allowing students to remain as close

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[21] The average round trip was 31 miles. (H.E.W. Report, July 10, 1969, p. 61).

to home as possible. Again the absoluteness of the neighborhood school concept prevents inquiry into the extent to which alternative assignment systems counteract this objective. The non-contiguous zoning plan proposed by the H.E.W. does *not* disperse students throughout the school system without relationships to any neighborhood schools. What the H.E.W. plan typically proposes to do is to require students and parents to relate to two neighborhoods, one black and one white, instead of to just one racial neighborhood. If parents living in proximity to one another wish to organize to act upon school problems they may still do so, except that they would hopefully work in concert with the parents of the paired zone to solve mutual problems. Yet no consideration may be given to these views given the absoluteness of the court's ruling below.

The Court of Appeals offers three alternatives to the desegregation of all schools: an integrated educational experience at some point in a child's educational career, a transfer policy allowing black students to transfer to white schools with transportation provided, and the establishment of a bi-racial committee to advise the School Board (16a). None of these alternatives provides a remedy for the constitutional wrong involved in maintaining racially segregated elementary schools.

Offering an integrated education in junior and senior high schools merely postpones the constitutional right to an integrated education and does not grant it "now". *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). It also fails to consider the damage caused by five or six years of segregated elementary education and the difficulties black children will face in integrated junior and senior high schools after a segregated elementary education. The second alternative, transfers with transportation provided, unlawfully seeks to shift the burden from the School Board back to black children. Freedom of choice

by whatever name has never worked in Mobile. *Davis* v. *Board of School Commissioners of Mobile County*, 393 F.2d 690 and 414 F.2d 1211 (5th Cir. 1968-69). The third "alternative," a bi-racial advisory committee, while probably salutary is not an alternative in fact. It is just an *advisory* committee to an all-white and recalcitrant school board.

Finally the Court of Appeals offers the illusion that "open housing, Title VIII, Civil Rights Act of 1968 . . . [and] *Jones* v. *Mayer*, 392 U.S. 409 (1969) . . . will serve to prevent neighborhood entrapment" (16a). To the contrary, open housing, which is a difficult enough goal to achieve, will probably become even more difficult now that the Court of Appeals has provided an added inducement for whites to maintain neighborhood segregation. If, on the other hand, everyone realized that no matter where any one moved in the school system his children would attend an integrated school—and assuming that local interest in a neighborhood school system is strong—then the more the Mobile community integrated its neighborhoods the less it would have to transport students.

II.

This Court Should Grant Certiorari in Order to Insure Petitioners' Due Process Right to an Evidentiary Hearing in the District Court.

The instructions of the Court of Appeals to the district court on June 3, 1969, *Davis* v. *Board of School Comm'rs of Mobile County*, 414 F.2d 609 (5th Cir. 1969), provided for the submission of a new desegregation plan to replace freedom of choice in Mobile, and that

> 3 . . . (e) For plans as to which objections are made . . . the District Court *shall commence hearings* beginning no later than ten days after the time for filing objections has expired.

Id. at 611 (emphasis supplied). Despite this clear mandate, and petitioners' expressed objections to provisions of the plan filed by the Mobile school board, the district court acted August 1, 1969 without a hearing. Similarly, on remand from this Court (*sub nom. Carter* v. *West Feliciana Parish School Bd., supra, implemented sub nom. Singleton* v. *Jackson Municipal Separate School Dist.*, No. 26285 (5th Cir., Jan. 15, 1970)), the district court merely held a "pre-trial conference" and then entered an order on a permanent desegregation plan without affording an opportunity for an evidentiary hearing.

The absence of a record upon which to review the district court's judgment led the Court of Appeals to issue a limited remand for fact finding by the district court on specific issues vital to determining the propriety of the district court's action, such as the extensiveness of Mobile's pupil transportation system. Yet again, the district court denied petitioners' motion for a hearing and made its findings without petitioners' having been able to confront the board's version of the facts and introduce evidence contradicting it. Petitioner's appeal below raised the denial of an evidentiary hearing as one of the issues, but the Court of Appeals, which also acted summarily,[22] ignored it.

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[22] The last regularly scheduled oral argument in a school desegregation case in the Fifth Circuit was held last summer, except for one argument held March 18, 1970 in *Bradley* v. *Board of Public Instruction of Pinellas County, supra.* Ten cases were removed from the regular calendar and argued together *en banc* November 15-16, 1969. *Singleton* v. *Jackson Municipal Separate School Dist., supra, rev'd sub nom. Carter* v. *West Feliciana Parish School Bd., supra.* Since that time, more than twenty decisions in such cases have been issued, all—with the exception of *Bradley*—without the benefit of oral argument. In addition, since *Singleton*, all school desegregation appeals have been subject to its vastly accelerated time schedule, see 419 F.2d at 1222, which often requires briefing and decision without benefit of a transcript. In light of the accelerated and summary procedures of the Court of Appeals, the district court's refusal to hold a hearing assumes even greater significance.

Petitioners submit that this consistent refusal to permit them to present their case is contrary to the most fundamental notions of due process. Particularly in our adversary system, courts rely upon the vigorous presentations of counsel to sharpen issues, focus litigation, and bring out the facts. Yet neither the district court, which selected and modified a plan, nor the Court of Appeals, which selected and modified a different plan, has heard counsel in this case.

The plans do, in a limited sense, speak for themselves. Assuming *arguendo* that the district court might have selected a plan to be implemented *pendente lite* without a hearing, (and we submit that under the principles of *Alexander* and *Carter*, this Court should require the implementation of Plan B-1 Alternative *pendente lite*) the final disposition of a case of this magnitude affecting tens of thousands of students should not be attempted without full exploration of the facts. If the district court was under the impression that it had an obligation to *finally* dispose of the case by February 1, 1970 at the cost of a full exploration of the facts at a hearing, then the court misread *Carter* and *Alexander*.

Only after a full hearing at which all parties have the opportunity to present their evidence should the district court rule on a permanent plan and in so doing, make detailed findings of fact. The findings of the district court in its January 31, 1970 order hardly acquit the court's obligation. The selection of isolated facts from a comprehensive plan to desegregate a large school district provides plainly inadequate support for whatever ultimate conclusion the court may reach. Finally, if the court by an appropriate standard does find isolated problems with a comprehensive plan it should require amendments rather than reject the plan in its entirety.

Merely remanding to the district court for an evidentiary hearing will serve no purpose, however, unless this Court also makes clear that in devising a remedy for the state-imposed dual school system in Mobile, neither the school board nor the district court is in any way limited by the "neighborhood school concept" expounded by the Court of Appeals. And, pending such hearing and the district court's determination, this Court should require Mobile to implement Plan B-1 Alternative *pendente lite*. *Cf. Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra* note 19.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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